NO. 82409-6

(Court of Appeals No. 35797-6-II)

SUPREME COURT OF THE OF THE STATE OF WASHINGTON

LEA HUDSON, individually,

Petitioner,

v.

CLIFFORD HAPNER and "JANE DOE" HAPNER, individually, and as a marital community composed thereof, and MATTHEW NORTON, a Washington Corporation,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Judge John McCarthy

SUPPLEMENTAL BRIEF OF PETITIONER LEA HUDSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE CASES

RULES AND STATUTES

I. INTRODUCTION

Lea Hudson, Petitioner herein and Plaintiff/Respondent below, asks the Supreme Court to reverse the Court of Appeals, Division II's, decision in *Hudson v. Hapner*, 146 Wn. App. 280, 187 P.3d 311 (2008) designated by the Petitioner in her Petition for Review, remand this case for the trial previously requested by Defendants and granted by Division II, and grant Plaintiff's request for attorney fees in both her first appeal and this appeal.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A Should this Court reverse Division II's decision allowing Defendants to unilaterally withdraw their Request for Trial de Novo when there is no legal authority that allows them to do so?

B. Should this Court reverse Division II's decision allowing Defendants to unilaterally withdraw their Request for Trial de Novo when they have clearly waived any right they might have had after nearly nine years of litigation including the completion of the trial de novo they requested, the appeal they requested, and subsequent discovery they requested upon remand?

C. Should this Court reverse Division II's decision allowing Defendants to unilaterally withdraw their Request for Trial de Novo when such opinion conflicts with prior Supreme Court and Court of Appeals' opinions including *Creso v. Phillips* and *Haywood v. Aranda* and flies in the face of justice?

D. Should this Court reverse Division II's decision allowing Defendants to unilaterally withdraw their Request for Trial de Novo when such opinion rewards the Defendants for their dilatory conduct, violates public policy, encourages mischief and delay, and leads to an absurd result?

E. Should this Court reverse Division II's denial of Petitioner's request for attorneys fees and costs when Plaintiff clearly and properly requested the same in all of her responsive pleadings to Defendant's

first appeal and in all of her responsive pleadings in the present appeal?

F. Should this Court reverse Division II's denial of Petitioner's request for attorneys fees and costs in both the present appeal and prior appeal in this case when such ruling violates MAR 7.3, directly conflicts with Division I's opinion in *Tribble*, 134 Wn. App. 163, 174-75, 139 P.3d 373 (2006), and leads to absurd results?

G. Should this Court reverse Division II's denial of Petitioner's request for attorneys fees and costs in both the present appeal and prior appeal in this case when did "not improve their position" from the arbitration award and Division II's opinion specifically provides that such fees and costs are Plaintiff's only legal remedy.

III. SUPPLEMENTAL STATEMENT OF THE CASE

The facts as applicable to this Supplemental Brief are set forth in the Petition for Review (hereinafter referred to as "Petition") and incorporated as though fully set forth herein. By way of further supplementation, it is necessary for this Court to have a better understanding of the true procedural and factual history in this case as the Defendants continually attempt to manipulate the facts and divert the Court from their dilatory actions by accusing the Plaintiff of inviting error by the trial court and then failing to anticipate Defendants' tactical abuse of the legal system and Division II's approval of the same. The Defendants have taken the phrase, "the best defense is a good offense" one step too far, and it is important for this Court to have an accurate recitation of the facts as they actually occurred over the

course of the past ten years without the self-serving and inaccurate spin provided by the Defendants.[1]

A reiteration of the timeline of the major procedural events that have taken place in the litigation of this case over the course of the past ten years is set forth below:

April 6, 1998	The Collision
October 19, 1999	**Law Suit Filed by Plaintiff**
February 15, 2000	Case Submitted MAR by Plaintiff
June 19, 2000	Mandatory Arbitration Held
November 17, 2000	Plaintiff Awarded $14,537.97
December 7, 2000	**Defendants Request Trial De Novo**
November 5, 2001	Defendants' Motion to Continue Trial
November 13, 2001	First Trial Setting - (Continued)
October 8, 2002	Second Trial Setting - (No Courtroom)
April 9, 2003	**Third Trial Setting - (To Verdict)**
April 16, 2003	**Jury's Verdict Totaling $292,298.00**
April 25, 2003	Judgment of $332,878.80 Entered
May 5, 2003	Defendants Move for a New Trial
May 16, 2003	Supplemental Judgment of $4,935.00
July 18, 2003	Defendants File Their First Appeal
April 12, 2005	Division II Reverses and Remands
January 11, 2006	Plaintiff's Petition for Review Denied
March 23, 2006	Division II Issues Mandate
August 9, 2006	Defendants File Motion to Compel
September 9, 2006	**Defendants File a Withdrawal of Their Request for Trial De Novo/ Note Presentation of Judgment**
December 15, 2006	Court Strikes the Withdrawal of the Request for Trial De Novo and Orders the Case to Proceed to its Second Trial
July 8, 2008	Division II Reverses Trial Court
April 29, 2009	Plaintiff's Petition for Review Granted

[1] In order to better assist the Court with the background facts of this case, attached hereto as Appendix "A" is a copy of the Petition for Review filed with this Court in the first appeal.

The first appeal in this case was based solely on evidentiary issues and Defendant's assignments of error to the same. First, the defendants complained that their purported expert was improperly excluded despite the fact that they only disclosed him in a brief supplemental response to an interrogatory propounded by Plaintiff and failed to disclosed him on any Primary Witness list or any other Witness list in direct violation of the court and local rules. They further argued that the trial court abused its discretion in (1) admitting Plaintiff's primary physician's testimony; (2) allowing Plaintiff to testify about her own medical treatment; (3) permitting Plaintiff's counsel to utilize a spine model in closing argument to illustrate the doctor's testimony regarding plaintiff's treatment; and (4) excluding irrelevant medical records referring to completely unrelated issues (i.e. hypertension, asthma, right knee pain, gynecological symptoms, rashes, bee stings, etc.)

Plaintiff moved to exclude the defendant's listed medical expert because the defendants did not properly disclose him in interrogatory answers and never disclosed him in any witness list in clear violation of the mandatory local court rule provisions. She further moved to exclude him based upon ER 702 and ER 703. The only disclosure Plaintiff ever received regarding Dr. Robert Cofelt was as follows:

> Dr. Cofelt has been consulted regarding and is expected to testify regarding his opinions about what injuries sustained plaintiff sustained as a result of the accident in question and what treatment was reasonable and necessary. The substance of the facts and opinions to which Dr. Cofelt is expected to testify are, in summary, that plaintiff sustained cervical, thoracic and lumbar strains in the accident in question; that she was recovered from those injuries around

July 1998 and that the treatment received through July 1998 was reasonable and necessary and any treatment thereafter was not necessitated by the accident in question.
A summary of the grounds for Dr. Cofelt's opinions are his review of Plaintiff's medical records, films, and his training and experience.
Dr. Cofelt's qualifications are set forth in the attached Curriculum Vitae.

Hudson v. Hapner, 126 Wn. App. 1057, pp. 1-2 (2005)

The answer set forth above is the **only information ever** provided by the Defendants regarding the expert they intended to call at trial. Dr. Cofelt did not perform a physical examination of the plaintiff pursuant to CR 35, or even a records review. The Defendants **never** filed a Possible List of Primary Witnesses pursuant to PCLR 5, or a Witness/Exhibit List pursuant to the case schedule, PCLR 1, and PCLR 3(b)(2).[2] Numerous courts have excluded experts solely on this basis. *See, infra.*

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[2] PCLR 3(b)(2) states in pertinent part:

(2) **Exchange of Exhibit and Witness Lists.** In cases governed by a Case Schedule pursuant to PCLR 1, the parties **shall** exchange: (A) list of witnesses whom each party expects to call at trial . . . **Any witness** or exhibit **not listed may not be used at trial**, unless the court orders otherwise for good cause and subject to such conditions as justice requires. (Emphasis added)

PCLR 5 states in pertinent part:

(a) **Scope.** This rule shall apply to all cases governed by a Case Schedule pursuant to PCLR 1

(b) **Disclosure of Primary Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

. . . .

(d) **Scope of Disclosure.** Disclosure of witnesses under this rule shall include the following information:

. . . .

3. **Experts.** ***A summary of the expert's anticipated opinions and the basis therefore and a brief description of the expert's qualifications*** **or a copy of curriculum vitae if available**. For the purposes of this rule, treating physicians shall be considered expert as well as fact witnesses.

(e) **Exclusion of testimony.** ***Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.*** Emphasis added.

The defense attempted to argue that Dr. Cofelt's opinions were properly disclosed and that Ms. Hudson should have taken Dr. Cofelt's deposition if she wanted more information about Dr. Cofelt's opinions. The Court questioned the defendant on how Dr. Cofelt could testify that Ms. Hudson recovered in July of 1998 since he had not seen her, unless there were records in existence to reflect that. Defense counsel argued that there were records to support that, but admitted that neither party had submitted the records pursuant to ER 904. When further questioned by the Court, defense counsel never identified the records that Dr. Cofelt had reviewed. In fact, it was never asserted that Dr. Cofelt had actually ever reviewed any records. Defense counsel admitted that Dr. Cofelt had not even reviewed plaintiff's treating physician's preservation deposition, which had been taken nearly six months earlier. Plaintiff was certainly in her right to move to exclude Dr. Cofelt and the Court exercised its discretion and granted Plaintiff's motion. Given the Defendants' failure to comply with the court rules, the trial Court ruled that it was not the Plaintiff's obligation to depose Dr. Cofelt, particularly when he obviously had no actual opinions to offer.

Directly contrary to the holdings in *Clipse v. State*, 61 Wn.App. 94, 808 P.2d 771 (1991), *Allied Financial Servs., Inc. v. Magnum,* 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993), *Henrickson v. State*, 92 Wn. App. 856, 865, 965 P.2d 1126 (1998), *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 693, 41 P.3d 1175 (2002), and *Lancaster v. Perry,* 127 Wn. App. 826, 832, 113 P.3d 1 (2005), Division II

interpreted CR 26(b)(5)(A) and held that the Defendants' disclosure of Dr. Cofelt as set forth above complied with the rule and reversed his exclusion and remanded the case for a new trial, ordering that Dr. Cofelt could testify at trial. Division II failed to address the Defendants' uncontroverted violations of PCLR 1, PCLR 5 and/or PCLR 3(b)(2).

With regard to the trial court's other evidentiary rulings, Division II held that Dr. Cummings' testimony would be admissible on retrial, Plaintiff may give a lay opinion on whether her injuries were caused by the accident, and Plaintiff's counsel may use the spine model in closing. The Court ruled that the irrelevant records excluded by the trial court could be admitted for the purpose of showing that Plaintiff did not report back pain at the time of her visits for completely unrelated issues. *Hudson*, 126 Wn. App. at p. 4.

In the first appeal, Plaintiff properly requested attorney fees pursuant to RAP 18.1 and MAR 7.3 and specifically designated a portion of her responsive brief to the same. In this current (second appeal), Plaintiff again requested attorney fees pursuant to RAP 18.1 and MAR 7.3 and specifically designated a portion of her responsive brief to the same. Plaintiff specifically argued that she was entitled to attorney fees based upon MAR 7.3 and (regardless of the outcome) the fact that Defendants did not improve their position. Finally, Plaintiff reiterated both of these arguments in her Motion for Reconsideration to Division II given the Court's ruling that the case was now finished and Defendants had not improved their position since the arbitration award was rendered.

V. ARGUMENT RE: WHY DIVISION II SHOULD BE REVERSED.

A. THE ABILITY OF A PARTY TO WITHDRAW ITS REQUEST FOR A TRIAL DE NOVO IS ONLY "IMPLIED" BY MAR 7.3 AND THEREFORE, IS NOT AN OPEN-ENDED RULE FOR WHICH THERE ARE NO LIMITATIONS.

1. PLAINTIFF WAS UNDER NO OBLIGATION TO FILE HER OWN REQUEST FOR A TRIAL DE NOVO ONCE THE TRIAL DE NOVO BEGAN.

In their Answer to the Petition, the Defendants' only main argument is that the onus was on Plaintiff to have assumed the burden of filing her own request for trial de novo and anticipating that the after seven years of litigation, a trial de novo, an appeal and further discovery upon remand, that Defendants would withdraw their request.

As set forth in Plaintiff's petition, no Court has ever analyzed a party's right to withdraw its request for a trial de novo. Although the Court in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), noted in dicta at p. 560, note 16, that "Washington's MAR do ***impliedly*** provide" a party the right to withdraw its request for trial de novo, the Court never cited any authority to support such a statement. The parties in *Thomas-Kerr* did not argue a party's ability to withdraw its request for a trial de novo. In fact, there is no specific authority that allows a party to withdraw its request for a trial de novo at any point in time. In order to allow such an action, this "right" must be read into MAR 7.3 and RCW 7.06.060. Given that the "right" is only implied, this Court should find that a party cannot withdraw

its request for a trial de novo once the trial de novo has commenced. In this case specifically, this Court should hold that the Defendants could not withdraw their request for a trial de novo given that not only did the trial de novo commence, but it was completed, appealed by the party who requested it, and then another trial was provided. The authority for such a holding is found in the rules regarding statutory construction.

If the intent of the statute [or a rule] is not clear from the language of the statute by itself, the court may resort to statutory construction, including a consideration of legislative history. *Cherry v. Municipality of Metropolitan Seattle,* 116 Wn.2d 794, 799, 808 P.2d 746 (1991). Given the "implicit" nature of MAR 7.3 and RCW 7.06.060, the intent of the statute and rule are not clear as to procedure or a time limitation and thus, must be interpreted by this Court.

Defendants posit that if MAR 7.3 and RCW 7.06.060 are silent on the procedure and timeline for the withdrawal of a request for trial de novo, that silence does not make the provisions ambiguous, but allows them to construed as to provide no limitations. They cite *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996) for this proposition, which is inapplicable.[3] Contrary to their own argument that there are no time limitations regarding a withdrawal, they actually do offer the Court limitations in the case of a

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[3] *Lively* is not applicable here because that case involved a criminal statute, RCW 9A.16.070, which was silent on the burden of proof, and the issue there was whether to apply the rule of lenity, which provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the defendant.

verdict that is not appealed pursuant to CR 55, 59 or 60 and therefore, they cut against their own argument.

Defendants' argument that the legislative history and purpose of the mandatory arbitration rules is somehow served by Division II's ruling allowing them unilateral withdrawal of their request for trial de novo is beyond laughable. They have now wasted the trial court's resources for seven years, the Court of Appeals' resources for two appeals, and attorneys fees and costs that have not been awarded on Plaintiff's behalf. In addition, Plaintiff's medical bills, all of which are still outstanding from 1998 on, have continued to accrue interest. Defendants have no response to this. Rather, they simply argue that the Court should not force the parties to undergo more litigation despite the fact they requested that litigation and have now significantly prejudiced Plaintiff by dragging this case out for nine additional years. Once the trial de novo in this case began, Defendants lost any opportunity they might have had to end the ongoing litigation in this case.

Defendants also argue that the likelihood of the scenario in this case repeating itself is minimal enough to justify the interpretation of the rules and statutory authority to allow for a party to delay resolution of a case for nine-plus years. There is no goal or intention of the legislature that is met by the outcome provided for by Division II's ruling and the Defendants' request. Under Division II's ruling, there is nothing to prohibit a party from starting a trial de novo and withdrawing mid-way through trial because the case appears to be heading in the other party's favor. Contrary to Defendants'

suggestion, under Division II's ruling, there is also nothing to prevent a party from withdrawing its request for a trial de novo post verdict. With the primary goals of the arbitration rules being to "discourage meritless appeals," 'reduce congestion in the courts and delays in hearing civil cases,'"and provide a "fair resolution," justice is not served and the purpose of mandatory arbitration is rendered a farce with Division II's ruling. *See, Sorenson v. Dahlen,* 136 Wn. App. 844, 149 P.3d 394 (2006); *Christie Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 303, 693 P.2d 161 (1984); *Thomas Kerr*, 114 Wn. App. at 564. Defendants' actions will only encourage meritless appeals, increase congestion in the courts, and significantly delay hearing civil cases. Plaintiff has certainly not received a "fair resolution."

Defendants' argument that Plaintiff should have anticipated this result and filed her own request for trial de novo nine years ago also completely undercuts the intent and purpose of MAR 7.3 and RCW 7.06.060. If every party had to anticipate a result such as in this case and file its own request for a trial de novo, it would render the punitive portion of MAR 7.3 and RCW 7.06.060, as well as the entire mandatory arbitration process meaningless. There would be no incentive or risk to the appealing party because once the other party filed its own request for a trial de novo and the trial de novo went forward and the original appealing party failed to improve its position, no fees or costs could be awarded. In a time where our Courts are so congested that it took three trial settings to have this case heard by a jury (due to unavailable court rooms) and insurance companies routinely appeal

arbitration awards without any hesitation (such as in this case with a $14,537.97 arbitration award), this Court needs to take a stand and prevent injustice by sending the message that intentional and baseless delays and complete wastes of judicial and party resources will not be allowed.

Further, Defendants' argument that because a new trial was granted in this case, "the case stands as if there had been no trial," although maybe applicable where a case is improperly dismissed and then rectified on appeal, does not apply in a case where the appellate court reverses for only evidentiary issues and with instructions to the trial court on remand. Without any authority, Defendants are arguing that the trial court would have the ability to ignore Division II's rulings set forth in its first opinion:

> We comment on additional issues that are likely to arise on retrial. Hapner argues that Exhibit 7 was relevant and admissible. . . . Exhibit 7 tended to disprove her claim of back pain, and it was relevant and admissible for that purpose. . . .Dr. Cummings' testimony is admissible on retrial . . . Hudson may give a lay opinion on whether her injuries were caused by the accident . . . Hudson's counsel may use the spine model in closing so long as he first shows, through one of the doctors or otherwise, that it accurately depicts the relevant parts of the human body.

Defendants also attempt to summarily do away with Division II's evidentiary rulings for remand by stating that the trial court never should have made those discretionary rulings in the first place and thus, Division II's directions have no meaning. This argument is in direct contravention of RAP 12.2, which states in pertinent part that:

> The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest

of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, **the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court**, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

(Emphasis added)

Also, under the law of the case doctrine, an appellate court's decision is binding on further proceedings in the trial court on remand. *State v. Strauss*, 119 Wn.2d 401, 412-13, 832 P.2d 78 (1992). This doctrine promotes "the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

The parties are not back in the same position had the trial de novo never occurred, and the previous trial is not a nullity. If Defendants' argument was valid, the trial court upon remand could rule in opposition to Division II's opinion and could again exclude Defendant's expert, Dr. Cofelt, it could continue to exclude all of Plaintiff's unrelated medical records and it could ignore the remainder of Division II's rulings. Clearly, that is not a possibility given the rulings and applicable authorities.

2. THIS COURT HAS PREVIOUSLY UNEQUIVOCALLY HELD THAT WAIVER APPLIES TO THE MANDATORY ARBITRATION RULES AND THUS IT SHOULD AGAIN APPLY THE DOCTRINE IN THIS CASE.

If MAR 7.3 and RCW 7.06.060 do "impliedly" provide a party a "right" to withdraw the request for the trial de novo it sought pursuant to MAR 7.1, then it follows that "right" can likewise be waived.

Relying upon Division II's holding that *Creso v. Phillips*, 97 Wn. App. 829, 987 P.2d 137 (1999), *Haywood v. Aranda*, 97 Wn. App. 741, 987 P.2d 121 (1999) or *Haywood v. Aranda,* 143 Wn.2d 231, 19 P.3d 406 (2001) are not applicable in this case, the Defendants argue that they have not waived their "implied right" to withdraw their request for a trial de novo post-trial de novo because there is "no unequivocal act or conduct evidencing an intent to waive, let alone an intentional and voluntary relinquishment of a known right." The defendants ignore that fact that they admittedly knew (or at least, should have known) of their "right" to withdraw their request for a trial de novo before the trial de novo commenced. In fact, their Answer is riddled with their argument that they could have withdrawn their request at **any** time. Yet, despite that knowledge, they unequivocally proceeded through six (6) years of litigation following the arbitration in this case, including a trial de novo, an appeal, and subsequent discovery upon remand, clearly evidencing their intent to waive any right they may have had to withdraw the request for a trial de novo they filed nine (9) years ago. Although they argue that *Haywood* does not apply here, they do not cite any authority for why the doctrine of waiver can likewise not apply in this case as this Court found it did in *Haywood*. Summarily arguing without authority against it does not change the applicability of the waiver doctrine.

3. EQUITABLE DOCTRINES PROVIDE A FURTHER BASIS FOR A DETERMINATION BY THIS COURT THAT WITHDRAWAL OF THE REQUEST FOR TRIAL DE NOVO IS NOT PERMISSIBLE.

The most offensive argument proffered by Defendants is the one they cite in opposition to the applicability of equitable doctrines in this case. In that regard, they argue that Plaintiff "slept on her rights" by not anticipating Defendants' intention of seven years of litigation, including proceeding through a trial de novo, an appeal and subsequent discovery, and requesting her own trial de novo. (Answer, p. 16) Defendants' arguments all ignore the fact that they simply did not request their trial de novo **prior** to the actual trial de novo.

Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Arkison v. Ethan Allen, Inc.,* 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped. *Id.* at 538-39. These factors are not an " 'exhaustive formula,' " but help guide a court's decision. *Id.* The purpose of the doctrine is " 'to preserve respect for judicial proceedings' " and " 'to

avoid inconsistency, duplicity, and ... waste of time.' " *Miller v. Campbell* 164 Wn.2d 529, 539, 192 P.3d 352 (2008)

Here, the Defendants (1) requested a trial de novo and proceeded with the trial de novo, an appeal and subsequent discovery after remand, a position which is clearly inconsistent with attempting to withdraw their request for a trial de novo following all of these events; (2) the trial court accepted that the Defendants wanted a trial de novo and gave them the same and Division II accepted that they wanted another trial and gave them the same, and the Defendants thus misled both Courts by subsequently attempting to withdraw such requests; and (3) the unfair detriment to Plaintiff is the wasted years of litigation, un-reimbursed expenses, attorney fees and costs, time, emotions, etc. There is no legal remedy that compensate Plaintiff for all of these losses, particularly when she owes attorney fees and costs for the appeal, which are still outstanding and which Defendants have not "volunteered" to pay.[4]

Equitable estoppel applies when a party has made an admission, statement or act that was justifiably relied upon to the detriment of another party. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Equitable estoppel applies where (1) one party makes an

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[4] Defendants continually attempt to ingratiate themselves by claiming that they "volunteered" to pay the $14,537.97 arbitration award and the attorney fees and costs already awarded by the trial court (amounts they previously fought against), but they have not offered to waive the costs previously assessed by the Court of Appeals and they have not "volunteered" to pay the attorney fees incurred by Plaintiff in the appeals that were necessitated because they filed their request for trial de novo. Upon actual examination of Defendants' "voluntary" offer, it is nothing more than what the Court has already ordered they are obligated to pay and Plaintiff is still left in significant debt as a result of the collision and injuries for which they admit fault.

admission, statement, or act inconsistent with a later claim, (2) another party reasonably relies on the admission, statement, or act, and (3) the relying party would be injured if the first party were allowed to contradict or repudiate the admission, statement, or act. *Dep't of Ecology v. Theodoratus,* 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). Here, the Defendants' actions of (1) requesting a trial de novo and proceeding with the trial de novo, an appeal and subsequent discovery after remand, is a position that is clearly inconsistent with attempting to withdraw their request for a trial de novo following all of these events; (2) the Plaintiff relied upon the defendants' request for a trial de novo since the Defendants actually proceeded with the trial, subsequent appeal and discovery upon remand and pursued her case throughout the course of all of those years; and (3) again, the Plaintiff is injured by all of the wasted years of litigation, expenses, time, emotions, etc. and now deserves the trial for which she spent all of these years in litigation.

Similarly, the purpose of laches is to prevent injustice and hardship, which could not be more applicable than in the present case. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 680 P.2d 453 (1984) (citing *Crodle v. Dodge*, 99 Wash. 121, 168 P. 986 (1917); *Johnson v. Schultz*, 137 Wash. 584, 243 P. 644 (1926)). It is appropriate to apply laches when a party, knowing his rights, takes no steps to enforce them and the condition of the other party has in good faith become so changed that he cannot be restored to his former state. *Id.* In this case, similar the analysis set forth herein and in Plaintiff's

Petition, Defendants knew their "implied right" to withdraw their request for a trial de novo prior to the trial de novo and they took no steps to withdraw their request until after they underwent their requested trial de novo, appeal and then requested further discovery of plaintiff. Plaintiff has not received any compensation whatsoever for all of her time, medical billings, fees, expenses, and now she cannot return to the position she was in 9 years ago, or even 6 years ago, immediately prior to the trial de novo proceeding.

B. PLAINTIFF HAS PROPERLY REQUESTED ATTORNEY FEES THREE TIMES PURSUANT TO MAR 7.3 AND RAP 18.1 AND THE DENIAL OF THE SAME FLIES IN THE FACE OF THE PURPOSE AND POLICY OF MANDATORY ARBITRATION

Defendants argue that Plaintiff did not timely request fees pursuant to RAP 18.1, arguing speciously that Plaintiff's request was limited to only if she won the appeal and insinuating that somehow precludes Plaintiff from obtaining fees pursuant to MAR 7.3 when she specifically pled in her opening responsive brief in a separately specifically designated section as required by RAP 18.1 that she was requesting an award of the reasonable fees and costs she "expended in defending this appeal" pursuant to the **applicable law under MAR 7.3 and RAP 18.1(b) based upon Defendants' failure to improve their position.** Her request was based upon RAP 18.1 and MAR 7.3 and not limited. She then reiterated this request in her Motion for Reconsideration based upon the Court's specific ruling that she was not entitled to fees because she was not the "prevailing party" in the appeal. She apprised Division II that its ruling denying her fees given its decision ending

the litigation conflicted directly with Division I's ruling in *Tribble v. Allstate*, 134 Wn. App. 163, 174-75, 139 P.3d 373 (2006) Defendants mysteriously cite *1515-1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*, 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002) in support of their argument, but that case has nothing to do with RAP 18.1.

Defendants also argue that Plaintiff was somehow required to renew her previous request for attorney fees and costs, also made pursuant to RAP 18.1 in her original opening brief in the first appeal. They cite no law for the same. Had Plaintiff never requested fees in either appeal, the situation would be different. However, Plaintiff did properly make her request for fees in both appeals and Division II denied those requests in both of their opinions. Plaintiff made a third request for fees in her motion for reconsideration given Division II's ruling.

Plaintiff is now requesting pursuant to RAP 18.1 that the Supreme Court reverse those rulings and award Plaintiff all of her fees as Defendants have "failed to improve their position" pursuant to MAR 7.3 since the arbitration award was rendered nine (9) years ago.

Defendants' argument that *Tribble v. Allstate* does not apply because it was a UIM case also has no merit. The case proceeded under the rules of mandatory arbitration and Division I determined specifically that because the successful appellant had nevertheless failed to improve its position as measured against the arbitrator's award, the losing party in the appeal was

nevertheless entitled to her attorney fees and costs on appeal. *Tribble*, 134 Wn. App. 163, 174-75, 139 P.3d 373 (2006) *See also Yoon v. Keeling,* 91 Wn. App. 302, 306, 956 P.2d 1116 (1998) (a party entitled to attorney's fees under MAR 7.3 at the trial court level is also entitled to attorney's fees on appeal if the appealing party again fails to improve its position).

If Division II's ruling were to stand and Plaintiff received none of the fees and costs she has now requested three times before the Court of Appeals, there would be an absolute injustice served. Defendants have clearly not "improved their position" since they filed their Request for a Trial de Novo on December 7, 2000, and they do not dispute this. Therefore, they are liable to Plaintiff for all fees and costs incurred by her since that time. This Court can reopen the prior appellate case under RAP 2.5(c)(2) and determine the appropriate remedies.

VI. CONCLUSION

It is respectfully requested that this Court reverse Division II's decision of July 8, 2008, remand this case back to the Superior Court for the new trial ordered by Division II's opinion of April 12, 2005, and award Plaintiff her attorney fees for both this and the prior appeal in this case.

DATED this 29th day of June, 2009.

Kari I. Lester, WSBA #28396
Attorney for Petitioner Lea Hudson

APPENDIX "A"

NO. _____

(Court of Appeals No. 30619-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

LEA HUDSON, individually,

Respondent/Petitioner,

v.

CLIFFORD HAPNER and "JANE DOE" HAPNER, individually, and as a marital community composed thereof, and MATTHEW NORTON, a Washington Corporation

Appellants.

PETITION FOR REVIEW

Ben F. Barcus, WSBA #15576
Kari I. Lester, WSBA #28396
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Attorneys for Respondent/Petitioner

NO. _____

(Court of Appeals No. 30619-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

LEA HUDSON, individually,

Respondent/Petitioner,

v.

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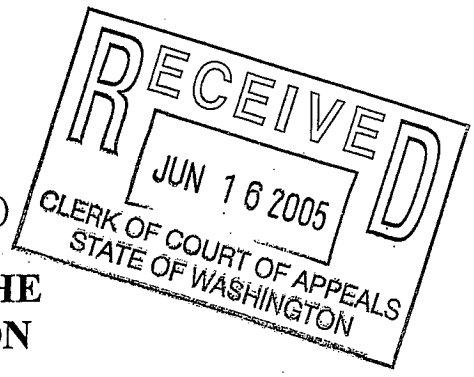

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Out of State Cases

Other Authorities

I. IDENTITY OF PETITIONER

Lea Hudson, individually, Plaintiff in the trial court and Respondent in the Court of Appeals, asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this Petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed April 12, 2005, vacating a jury verdict and remanding for new trial. A motion to publish was denied on May 11, 2005, and a motion for reconsideration was denied on May 17, 2005. A copy of the Court of Appeals' Opinion and Orders is located in the Appendix at A1 through A7.

III. ISSUES PRESENTED FOR REVIEW

A. Whether a response to a CR 26(b)(5)(A) interrogatory requiring a party "to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules" is satisfied by a conclusive statement of medical opinion and an indication it was grounded on review of plaintiff's medical records.

B. Whether it is an abuse of discretion to exclude expert witness testimony on the basis of violation of CR 26(b)(5)(A).

IV. STATEMENT OF THE CASE

The traffic collision which is the subject of this personal injury action occurred on April 6, 1998. (CP 3-7, 15; RP 92-95).

Plaintiff Lea Hudson was stopped at an intersection when her vehicle was rear-ended by a truck driven by Defendant Clifford Hapner while in the course of his employment with Defendant Matthew Norton, Inc. (CP 16; RP 92-93, 99-101, 114-16). Defendant Hapner was traveling at an admitted 35 miles per hour when the truck struck Lea Hudson's stationary vehicle. (CP15; RP 99, 101-105, 116).

Due to the significance of the collision and the severity of her injuries, Lea Hudson had to be transported from the scene of the collision via ambulance to St. Clare Hospital for emergency treatment. (RP 123-24). Lea Hudson was experiencing pain in her neck, lower and upper back, and numbness and tingling in her legs. (RP 121-122). Ms. Hudson spent nearly seven hours at the hospital where she was examined, had x-rays taken, and was given prescriptions and a cervical collar (RP 131). She was discharged, advised not to return to work for at least three days, and to follow up with her physician (RP 131-134).

Ms. Hudson's physician diagnosed an acute myofacial strain of her neck, upper, and lower back. (RP139). She was prescribed medications, advised to remain off work, and referred for a course of physical therapy (RP 138). Ms. Hudson missed 56 hours of work as a phlebotomist at Good Samaritan Hospital. (RP150). She underwent physical therapy for a period of approximately three months (RP 145).

On April 28, 1999, Ms. Hudson was involved in a subsequent minor accident when a vehicle rolled into her vehicle while at a stop. No damage occurred to either vehicle from this accident. (RP150-52). As a result of this accident, Ms. Hudson experienced some upper back and upper neck pain (RP 153-154). She did not suffer any additional injury to her lower back at that time (RP 154, 273-74).

In June 1999, Ms. Hudson relocated to Clarksdale, Mississippi, to be with her mother (RP 151, 155, 161). She was still experiencing her low back pain, and it was her understanding that there was nothing that she could do for her back other than take muscle relaxers and pain medication. (RP 155, 162-63) Ms. Hudson also tried alleviating her pain by wearing a back brace. (RP156). On August 18, 1999, Ms. Hudson experienced a significant flare-up of her lower back injury and received medical treatment. (RP 163)

Ms. Hudson filed suit on October 19, 1999, and the action was subsequently submitted for Mandatory Arbitration on February 15, 2000. (CP 15-18; 1051) Ms. Hudson received an arbitration award of $14,537.97. (CP 206) The defense filed a request for a trial *de novo*. (CP 1053-53) Trial was subsequently set for November 13, 2001. (CP 24)

Following the arbitration hearing, Ms. Hudson suffered another flare-up of her low back pain in June 2000 for which she

sought additional treatment. (RP 164, 167. 174; CP 735-38)

Ms. Hudson then suffered a much more severe flare-up of her low back in January 2001 such that she could not even walk. (RP 164, 165) Dr. Johnnie Cummings diagnosed Ms. Hudson with persistent low back pain and resulting numbness in both of her legs and had her admitted into the hospital where she stayed for six days. (RP 166, 170; CP 739-57) During the course of her stay in the hospital, Ms. Hudson underwent diagnostic testing, which indicated that she had significant injury to a number of discs. (RP 167-168; CP 742-45, 754) Ms. Hudson was advised to consult with a neurosurgeon, which she did. (RP 167-CP 747-48, 756) The neurosurgeon opined that she was suffering from chronic recurrent lumbosacral strain with associated mild central disc prominence. (CP 750-51) He recommended that she continue with conservative treatment and apply heat to her lumbar spine. Ms. Hudson was also referred for a course of physical therapy where they provided "shock treatments" to her lower back. (RP 172-73)

On November 5, 2001, the defendants moved the trial court to exclude evidence, or in the alternative for a continuance and an order allowing additional discovery, including a CR 35 examination. (CP 25-54) The Plaintiff did not oppose the continuance or the request for an examination based upon Ms. Hudson's significant ongoing collision-related injuries and treatment for the same. (CP 92-99) The court denied the defense's

motion to exclude evidence, but granted the motion to continue the trial date. (RP 9-10) The court also granted the defendant's motion for a CR 35 examination. (RP 10) The trial date was continued and subsequently re-set to April 7, 2003. (CP 133-35)

On January 7, 2000, plaintiff propounded interrogatories and discovery requests to defendants. In that regard, Interrogatory No. 26 and Request for Production No. 11 with the defendants' corresponding answers (provided on February 4, 2000) are set forth below:

26. **INTERROGATORY**: Pursuant to Civil Rule 26, please identify each person whom you expect to call as an expert at the time of trial. **YOUR FAILURE TO FULLY AND TIMELY ANSWER THIS INTERROGA-TORY WILL RESULT IN PLAINTIFF OBJECTING TO THE USE OF SUCH EXPERT AT TIME OF TRIAL.** As to each expert, please state: expert's full name, job title, address and telephone number; name, address and telephone number of expert's employer, if any; whether any written reports have been furnished by the expert to defendant and, if so, the dates thereof; subject matter on which the expert has been consulted or is expected to testify; substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion to which the expert is expected to testify and a statement of the expert's qualifications to testify in this action.

RESPONSE:
Unknown at this time. Defendant has not made a decision on experts at this time. Defendant reserves the right to supplement this response at a later date.

11. **REQUEST FOR PRODUCTION**: Please produce all papers identified in response to the preceding interrogatory.

RESPONSE

N/A
(CP 228-29, 232-33)

Then, on August 20, 2002, defendants supplemented their discovery responses as follows:

> **RESPONSE**:
> Robert H. Cofelt, MD
> Neurologist
> Self-Employed
> Tallman Medical Center
> 5342 Tallman Avenue NW, Suite 202
> Seattle, WA 98107
> (206) 706-6210
> No report has been furnished
>
> Dr. Cofelt has been consulted regarding and is expected to testify regarding his opinions about what injuries plaintiff sustained as a result of the accident in question and what treatment was reasonable and necessary. The substance of the facts and opinions to which Dr. Cofelt is expected to testify are, in summary, that plaintiff sustained cervical, thoracic, and lumbar strains in the accident in question; that she was recovered from those injuries around July 1998 and that the treatment received through July 1998 was reasonable and necessary and any treatment thereafter was not necessitated by the accident in question.
>
> A summary of the grounds for Dr. Cofelt's opinions are his review of plaintiff's medical records, films, and his training and experience.
>
> Dr. Cofelt's qualifications are set forth in the attached Curriculum Vitae.

11. **REQUEST FOR PRODUCTION**: Please produce all reports identified in response to the preceding interrogatory.

> **RESPONSE:**
> Attached hereto.

There was no report attached, only the doctor's one page Curriculum Vitae. (CP 235-37).

Other than the answer drafted by defense counsel, defendants never provided Plaintiff with Dr. Cofelt's opinions.(RP 25) Moreover, despite two additional requests from plaintiff's counsel for a report setting forth Dr. Cofelt's opinions (and the basis for those opinions), the defendants still declined to provide the same. (CP 239, 241, 243). Defendants never scheduled a CR 35 examination of plaintiff.

On the first day of trial, Plaintiff moved to exclude Robert Cofelt, MD as an expert witness. (CP 235-37) Plaintiff's motion was based in part on defendants' non-disclosure of Dr. Cofelt's opinions and basis thereof, pursuant to CR 26(b)(5)(A). (CP 218) In addition, Defendant Hapner never filed a Primary Witness List or a Witness/Exhibit List.

The defense argued that Dr. Cofelt's opinions were properly disclosed and that Ms. Hudson should have taken Dr. Cofelt's deposition if she wanted more information about Dr. Cofelt's opinions. (RP 29-31) The Court questioned the defendant on how Dr. Cofelt could testify that Ms. Hudson recovered in July of 1998 since he had not seen her, unless there were records in existence to reflect that. (RP 32) Defense counsel argued that there were records to support that, but admitted that neither party had submitted the records pursuant to ER 904. (RP32-33)

When further questioned by the Court, defense counsel never identified the records that Dr. Cofelt had reviewed. In fact, it was never asserted that Dr. Cofelt had actually ever reviewed any records. When the

Court asked defense counsel if Dr. Cofelt had reviewed plaintiff's treating physician's preservation deposition, which had been taken nearly six months earlier, defense counsel answered, "No." (RP 40)

After hearing argument, the Court excluded Dr. Cofelt from testifying at trial pursuant to CR 26, "I think the discovery rule provides that more specific information as to the opinion, the bases and what was utilized to formulate that opinion needs to be provided." (RP 50-51)

Trial proceeded on April 9, 2003. (RP 3) As Defendants had previously stipulated to liability, the only issues at trial were the nature and extent of Ms. Hudson's injuries and damages. (CP 137-38) The jury returned a verdict for Ms. Hudson in the amount of $292,298.00. (CP 279, 376) The court awarded Plaintiff costs and attorney's fees pursuant to MAR 7.3. (CP 469-72)

Following the entry on the verdict, defendants moved for a new trial, or in the alternative, remittitur. (CP 496-514) The defense argued, in part, that the court erred by excluding the testimony of defendants' expert, Dr. Cofelt. The court denied the motion and entered Findings of Fact and Conclusions of Law. (CP 984-990) The Court stated:

> **First of all, even as of this date, there is nothing in the file from Dr. Cofelt**. There is no chart note. There is no record. There is no medical report. There is even no summary of his testimony indicating the specific dates he formulated, an opinion in what he reviewed. Even today there is not.
>
> The only thing in the file is the fact that the defendants amended their interrogatory and at one point in time said

they were going to call Dr. Cofelt who was expected, quote, unquote, to testify that, in essence, the plaintiff's injuries were only of three month's duration. That interrogatory was not signed by the doctor. It was apparently signed by the client and signed by defense counsel. There is no reference as to when the doctor was consulted, what the doctor was provided. .... [W]e don't know and to this day we do not know when Dr. Cofelt reviewed any records, what he reviewed. And I engaged Mr. Klusmeyer at length on the day of trial to avoid a situation where someone is surprised by evidence, I engaged Mr. Klusmeyer at length to try and find out what his expert, who did a record review, apparently; although, we have no real record of that, other than Mr. Klusmeyer saying that Dr. Cofelt was expected to testify in a certain fashion, **I engaged him at length to try and find out what Mr. Cofelt would – or what Dr. Cofelt would say and he reviewed.** . . . . I engaged Mr. Klusmeyer, tried to find out what, if anything, he was going to ask Dr. Cofelt about what Dr. Cummings had to say six months earlier and a couple of months earlier, and the record is clear that Mr. Klusmeyer hadn't discussed with Dr. Cofelt what Plaintiff's expert from the state of Mississippi had testified to.

Now, what situation would that put the plaintiff under if Dr. Cofelt is allowed to come before the jury and testify and say, "Oh, by the way, I have now looked at these preservation depositions, and I disagree for the following reasons, and I've considered this?"

How in the world is the plaintiff going to be in the situation where the plaintiff with the physician from Mississippi is able to rebut that type of testimony? Call the plaintiff from Mississippi? Do another preservation deposition? Continue the trial in midstream so that the doctor's schedule can be worked out and the parties can sit before an another video camera and preserve another deposition while the jury waits. That's exactly why the rules of discovery are as they are, I understand them. That's the intent of CR 35 is that if the defendant is going to do an examination, provide a report. **And Rule 26 requires the appropriate foundation to be provided so that the plaintiff is not in a situation where**

it's responding at the last second to that sort of shotgun approach by an expert whose opinions and the basis for which we have no idea what they are even to this day.

So I think this whole issue, it combines a discussion, and I have discussed CR 35. I've discussed CR 26 to some extent, and I think I have referenced the fact that Dr. Cofelt never examined the plaintiff. **And I believe that based upon the lengthy dialogue I had with Mr. Klusmeyer, that the sanction imposed was the appropriate sanction to impose, in light of the shotgun, last-second approach that was being developed by the defense. I think exclusion of Dr. Cofelt is indeed appropriate.**

(Transcript of Proceedings, May 16, 2003, 22-28) (Emphasis added). In the Court's Order regarding Findings of Fact, the Court stated:

9) The Court further finds that at no time was there ever any indication provided by or representation made by the Defendants as to when Dr. Cofelt allegedly reviewed any of the Plaintiff's medical records and exactly what records he might have reviewed, also defense counsel advised the court on the first day of trial (04/09/03), that Dr. Cofelt had not reviewed Dr. Cumming's opinions and testimony prior to trial in this case;

10) The Court further finds that Dr. Cofelt did not provide any records, chart notes, or report in this case and did not prepare or provide any notes or a summary to indicate any opinions he might have formulated in this case apart from what is noted in Defendants' supplemental Interrogatory answer, which is authored and signed only by defense counsel, which essentially only advised Plaintiff that Dr. Cofelt would testify that Plaintiff's injuries were only of three month's duration and which were not signed by the doctor;

. . . . . .

12) The **Court further finds that Defendant's discovery responses regarding Dr. Cofelt failed to meet the requirements under CR 26 and Defendants failed to disclose expert information under PCLR 5 and the applicable case schedule,** that there was no reasonable

> excuse set forth by the defense for such failures, and that based on such failures, Plaintiff was greatly prejudiced in her ability to prepare for trial and any cross-examination of Dr. Cofelt;
> (CP 987) (Emphasis Added)

Defendant appealed and on April 12, 2005, Division II reversed and remanded the case for a new trial. The court held that defendants "adequately summarized Dr. Cofelt's testimony for purposes of CR 26(b)(5)(A)(I)." Slip Op. at 3. The court reasoned:

> Hudson argues that Hapner's summary was inadequate to meet the requirements of CR 26(b)(5)(A)(I), in part because it merely stated that his opinions would be based on medical records. Given that a doctor can testify at trial based solely on medical records, however, the proponent of such a doctor must be able to summarize by stating that the doctor will rely on medical records. Although the opponent can argue that the records provide an unreliable basis, the argument goes to weight rather than admissibility. We conclude that Hapner adequately summarized Dr. Cofelt's testimony for purposes of CR 26(b)(5)(A)(I).
>
> In ruling this way, we do not hold or suggest that Hudson was not entitled to more detailed information. She certainly was – but to obtain it, she had to depose Dr. Cofelt under CR 26(b)(5)(A)(ii). Hapner complied with CR 26(b)(5)(A)(I), and the trial court erred by excluding Dr. Cofelt's testimony.

Slip Op. at 3 *(footnotes omitted)*.

The court further held that even if it were to assume a failure to comply with CR 26(b)(5)(A), the trial court erred in imposing the sanction of exclusion of the expert testimony. Slip Op. at 4. The Court did not directly address the trial court's exclusion of Dr. Cofelt on the basis of the

Defendant's failure to comply with PCLR 5. The court reversed and remanded for new trial. Motions to publish and for reconsideration were denied on May 11, 2005 and May 17, 2005, respectively.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Decision Holding that the Answers to Interrogatories Complied with CR 26(b)(5)(A) Conflicts with Decisions from Other Divisions of the Court of Appeals.

The opinion of the Court of Appeals conflicts with *Clipse v. State*, 61 Wn.App. 94, 808 P.2d 771 (1991). In *Clipse*, the court held a patient's disclosure of expert witnesses in a medical malpractice action was misleading and inaccurate, warranting the imposition of sanctions. Pursuant to a discovery order fashioned in the language of CR 26(b)(5)(A), the plaintiff was to "identify each of his experts he expected to call at trial, along with a summary of the expected opinions of each and the basis upon which such opinions are made." *Clipse*, at 96. Plaintiff designated six doctors, a nurse, and a medical records custodian as expert witnesses and provided a brief summary of the testimony of each expert. The defendants deposed two of the designated doctors, the nurse, and the medical records expert. From these depositions it was determined by defendants that plaintiff had neither contacted the designated experts, asked them to testify at trial, nor provided them with records or depositions upon which they could form an expert opinion.

The Court of Appeals held it was appropriate to sanction plaintiff pursuant to CR 26 for failure to comply with the rules of discovery. Plaintiff had failed to make a "reasonable inquiry" as to the doctor's testimony, opinions, and bases of those opinions. The court's conclusion is instructive:

> Clipse **had an obligation to reveal the specific opinions his experts would testify to and the bases of those opinions so that the respondents would have an opportunity to discover those opinions and prepare their defense accordingly**. Clipse claims that he made a reasonable inquiry because either he or his attorney contacted the above designated experts before disclosing them and summarized their anticipated testimony based on records reflecting their "knowledge." He also asserts designating these witnesses as "experts" because of their "specialized knowledge" was not misleading. Clipse's disclosure was misleading, however, because Clipse made no attempt to learn the *opinions* of certain designated experts, when the discovery order specifically required him to summarize the expected opinions of his expert witnesses and the bases for each of their opinions. **Clipse's assertion that he could predict the opinions of his medical experts by reviewing the medical records himself when those records did not contain any stated opinions is untenable.** Moreover, Clipse at no time made any attempt to revise his disclosures concerning his expert witnesses. Clipse's designated experts were not familiar with the issues and facts relevant to the lawsuit and had not formulated opinions relevant to the lawsuit when the respondents deposed them. Thus, with the exception of Nurse Koelblinger, Clispe's discovery disclosure was misleading and respondents' efforts toward deposing these individuals caused them unnecessary expenditures of time and money.

Clipse, at 101-02.[1] (Emphasis added).

The holding in *Clipse* is in accord with the purposes of CR 26(b)(5)(A) to permit a party by interrogatory to require any other party to identify each person the other party expects to call as an expert witness at trial, to learn the subject matter on which each expert witness is expected to testify, to obtain a summary of the grounds for each expert opinion, and to obtain such other information about each expert witness as may be discoverable under the civil rules.

According to the WSBA comments submitted to the Supreme Court when the rule was proposed, the purpose of the "such other information" clause was to allow a party the option of conducting discovery with respect to expert witnesses entirely by interrogatory, without the expense and inconvenience of depositions.[2] Thus, according to the WSBA comments, it is improper to respond to interrogatories by saying simply "take the witness's deposition." Orland & Tegland, 4 Washington Practice: Rules Practice CR 26 (4th Ed. 1992) (Pocket Part 2004).

The basis for CR 26(b)(5)(A) is provided in the advisory

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[1] The motion for sanctions did not request exclusion of testimony. Prior to resolution of the motion, the claim was submitted to arbitration resulting in a judgment for defendant. Thus, the request for sanctions was confined to an award of expenses incurred in conducting unnecessary depositions of plaintiff's experts.

[2] A party seeking discovery with respect to an expert, other than responses to interrogatories, must pay the expert a reasonable fee for time spent in responding. CR 26(b)(5)(C).

committee notes to the 1970 amendment of Fed.R.Civ.P. 26(b)(4).[3] Under the 1970 amendment, Federal Civil Rule 26(b)(4)(A)(I) similarly provides that "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter in which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and the summary of the grounds for each opinion." The Advisory Committee commented on the necessity of pretrial discovery of experts as follows:

> Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base this judgment on the stand ... Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery then the narrowing of the issues and the elimination of surprise which discovery normally produces are frustrated.

Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981) (quoting, Advisory Committee Notes, Rule 26, Fed.R.Civ.P., 28 USCA.) In *Smith*, the court held prejudicial error occurred in admitting medical expert's testimony where interrogatory

[3] Federal Rule 26 has been further amended and now mandates disclosure by written report of all opinions to be expressed by the expert and the reasons therefor, all data or other information "considered by" the expert, exhibits to be used by the expert, the qualifications of the expert, the expert's compensation, and other cases in which the expert has testified. Fed.R.Civ.P. 26(a)(2).

responses did not adequately apprise the opposing party of expert's proposed testimony. In response to the argument that the testimony could have been elicited had the expert's deposition been taken, the court reasoned that absent an appropriate apprisal of the proposed testimony in response to interrogatories, the deposition of the expert was unnecessary. *Smith*, at 798.

The same interpretation has been given to Montana Civil Rule 26(b)(4)(A)(I) which provides for a statement of the subject matter on which each expert would testify, the substance of the facts and opinions to which each expert would testify, and a summary of the grounds for each opinion. In *Seal v. Woodrows Pharmacy*, 988 P.2d 1230 (Mont. 1999) the Supreme Court of Montana affirmed the exclusion of expert testimony where expert witness disclosure did not adequately state the substance of the facts and opinions to which the expert would testify or the summary of the grounds for the expert's opinion. The disclosure provided that the expert's "position is that the standard of care for pain management was not met in this matter, and that the controlled substance prescribed by ... were excessive." *Seal*, at 201. The court summarily found this disclosure was lacking in substance. Addressing the argument that the opposing party has the burden to seek additional information through follow up interrogatories or deposition, the court held that Rule 26(b)(4)(A)(I) requires the disclosures and the requesting party is not burdened with

ensuring compliance. *Seal*, at 202-03.

A party is also under a duty to supplement a response to any interrogatory addressed to the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. CR 26(e)(1). A party is under a duty to amend a prior response if he obtains information upon the basis of which he knows that the response was incorrect when made, or he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. CR 26(e)(2). In accordance with these provisions Defendant Hapner had a duty to supplement his interrogatory response upon actual review of the medical records.

Here, the Court of Appeals' opinion permits defense counsel to supply by summary a prediction of the medical testimony the defense medical expert is expected to opine. This holding conflicts with *Clipse*. The answers to CR 26(b)(5)(A) interrogatories must demonstrate the substance of the facts and opinions and to which the expert is to testify and the grounds for such testimony.

The Court of Appeals' decision is also in conflict with *Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 75 P.3d 533 (2003). In a suit for wrongful termination, in response to plaintiff's interrogatories the defendant took the position that it had only one basis

for terminating plaintiff's employment. At trial, defendant sought to introduce evidence that another basis existed for termination. The trial court excluded such testimony and the Court of Appeals affirmed. The court held that if defendant wanted to argue this additional basis for termination, it had to disclose this basis when plaintiff requested this information in interrogatories. Also, defendant should have updated its responses. *Carlson* at 738. The court reasoned that when applying the discovery rules to the facts, the trial court must determine whether the responses to interrogatories and requests for production were made after reasonable inquiry and (1) were consistent with the rules, (2) were not interposed for any improper purpose, and (3) were not unreasonable or unduly burdensome or expensive; in short, the responses must be consistent with the letter, spirit, and purpose of the rule. *Carlson*, at 738 [citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993)].

In the present case, the trial court applied discovery rule CR 26(b)(5)(A), to the facts and determined the answer failed to properly apprise the Plaintiff of the substance of the facts and opinions to which the expert was expected to testify and the grounds for the expert's opinion. The trial court questioned defendant's counsel and determined defendant had not made a reasonable inquiry as to the opinions of defendant's named expert. The defendant had an obligation to disclose the opinions and basis

thereof and failed to do so. The Court of Appeals' interpretation of CR 26(b)(5)(A) conflicts with the decisions from other divisions of the Court of Appeals. Thus, review should be granted.

B. The Court of Appeals' Decision Finding that the Trial Court Failed to Consider the Appropriate Criteria and Impose the Least Severe Sanction Conflicts with Decisions of the Supreme Court and Decisions from Other Divisions of the Court of Appeals.

A trial court's decision to exclude a witness is reviewed for an abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 33 P.2d 1036 (1997). This "determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Burnet*, at 494. Before evidence is excluded for a discovery violation, the trial court must (1) find that the party's violation was willful, (2) find that the violation substantially prejudiced the opposing party, and (3) consider, on the record, whether lesser sanctions would sufficiently address the violation. *Burnet*, at 494. Here, the record clearly reflects the trial court's consideration of the *Burnet* criteria. (RP 32-51; CP 984-990).

A party "willfully" violates discovery rules when he or she does so without a reasonable excuse. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 169, 786 P.3d 781 (1990). When a party offers no reasonable excuse for

its failure to disclose witnesses or supplement discovery, the trial court is entitled to conclude that the discovery violation was willful. *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994). An evasive or incomplete answer is a failure to answer. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 693, 41 P.3d 1175 (2002). Here, when questioned by the trial court, defendants offered no reasonable excuse for not supplying disclosure of its expert's anticipated testimony. Defendants simply contended that further information could be obtained through deposition. (RP 31-51; CP 984-990).

It further appears in the record that the trial court considered the plaintiff to be substantially prejudiced by defendants' non-disclosure. (RP 31-51; CP 984-990). Courts have found prejudice where information withheld in violation of a court order is "intrinsically bound up with the merits of the case," *Delany v. Canning*, 84 Wn. App. 498, 508, 929 P.2d 475 (1997), or where discovery is wrongfully withheld for a protracted period, or when there is little time remaining before trial. See *RCL Northwest, Inc. v. Colo. Resources, Inc.*, 72 Wn. App. 265, 266-68, 864 P.2d 12 (1993). The court's finding of prejudice here is fully justified. The information sought directly related to the merits of Hudson's claim and Hapner's possible defenses. The court's ruling occurred on the first day of trial and thus, plaintiff was left without sufficient time to obtain appropriate responses prior to the commencement of trial testimony.

Hudson could not effectively prepare for trial.

The court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). Here, the sanction of exclusion of testimony is the only effective sanction. Any lesser sanction would undermine the purpose of CR 26(b)(5)(A).

Whether to admit or exclude expert testimony is discretionary with the trial court. The Court of Appeals will not find abuse of discretion in deciding to admit or exclude expert testimony unless no reasonable person would take the position adopted by the trial court. *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003); *Lancaster v. Perry*, No. 54028-9-I (Slip. Op. April 4, 2005)(publication ordered June 1, 2005). The Court of Appeals' decision conflicts with the above-referenced authority. Thus, review should be granted.

C. The Court of Appeals' Opinion Fails to Address the Court's Exclusion of Dr. Cofelt on the Secondary Basis of Hapner's Failure to Comply with PCLR 5(d)(3) When Other Divisions of the Court of Appeals Have Upheld Exclusion of Experts on Such Grounds.

In addition to excluding Dr. Cofelt pursuant to CR 26(b)(5)(A), as set forth in the Order above, the trial court also excluded him pursuant to

PCLR 5, the local rule regarding the disclosure of possible lay and expert witnesses (CP 987). PCLR 5 states in pertinent part as follows:

> (a) **Scope.** This rule shall apply to all cases governed by a Case Schedule pursuant to PCLR 1.
>
> (b) **Disclosure of Primary Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.
>
> . . . .
>
> (d) **Scope of Disclosure.** Disclosure of witnesses under this rule shall include the following information:
>
> . . . .
>
> 3. **Experts.** ***A summary of the expert's anticipated opinions and the basis therefore and a brief description of the expert's qualifications*** **or a copy of curriculum vitae if available.** For the purposes of this rule, treating physicians shall be considered expert as well as fact witnesses.
>
> (e) **Exclusion of testimony.** *Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.*

Despite the fact that Plaintiff raised the issue in her Response Brief, in reversing the trial court, Division II only mentioned PCLR 5(d)(3) in passing, and noted that "[i]t was not mentioned or relied on by the trial court, so we omit it from the text." Slip Op. at 3, FN 9. However, the Findings of Fact set forth above demonstrate that PCLR 5 was clearly part of the Court's Order and was a basis for the Court's exclusion of Dr. Cofelt.

In *Lancaster v. Perry*, No. 54028-9-I (Slip. Op. April 4, 2005)(publication ordered June 1, 2005), the Court excluded the defendants' witnesses/experts because the defendants failed to file a proper Primary Witness List pursuant to KCLR 26(b)(3)(A), which is nearly identical to PCLR 5(d)(3). In the case at hand, Defendant Hapner never filed a Primary Witness List (or even final or rebuttal Witness List) and completely failed to comply with the mandatory language of PCLR 5(d)(3). Pursuant to *Lancaster*, the Court's exclusion of Dr. Cofelt based upon Defendant's failure to comply with PCLR 5(d)(3), which was in addition to his exclusion pursuant to CR 26(b)(5)(A), should have been upheld. Moreover, the *Lancaster* court held that in a situation where a party has failed to comply with KCLR 26(b)(3)(A), analysis under *Burnet, supra*, is not required.

An appellate court may affirm a trial court's ruling on any grounds the record supports. *Hendrickson v. King County*, 101 Wn. App. 258, 2 P.3d 1006 (2000). In this case, Defendant Hapner cannot dispute that he completely failed to file a witness list as required by PCLR 5 and therefore was in violation of the rule. Such violation does not require a consideration of *Burnet, id.*, and mandates exclusion of any witness not disclosed.

The Court of Appeals' decision essentially holding that the trial court abused its discretion in excluding Dr. Cofelt when the Court of Appeals failed to analyze Defendant Hapner's violation of

PCLR 5(d)(3) and the trial court's exclusion of Dr. Cofelt on that basis, conflicts with Division II's holding in *Lancaster*. Thus, review should be granted.

D. The Court of Appeals' Holding that the Substance of the Facts and Opinions of an Expert Witness May Only Be Discoverable Through Deposition Involves an Issue of Substantial Public Concern.

A purpose of CR 26(b)(5)(A) is to allow a party the option of conducting discovery with respect to expert witnesses entirely by interrogatory, without the expense and inconvenience of depositions. Orland & Teglend, 4 Washington Practice: Rules Practice CR 26 (4th Ed. 1992) (Pocket Part 2004). Increasingly, defense counsel have been utilizing the discovery rules as a shield rather than a tool. Counsel are providing minimal responses to CR 26(b)(5)(A) interrogatories (often without the expert's input) as a means of forcing plaintiffs into conducting expert witness depositions. Because the experts are entitled to fees for time spent in deposition and the increasingly alarming rates charged by the experts, a chilling effect upon plaintiffs' ability to seek redress for personal injuries occurs when they are forced to conduct depositions.

The Court of Appeals' opinion furthers this improper use of discovery. A mere statement of ultimate medical opinion with the assertion that support is derived from a review of the plaintiff's medical records essentially informs plaintiff of nothing. Nothing

had been produced upon which a causal connection can be made between the expert's opinion and the medical records. There is no true "summary of the grounds for each opinion." There is a failure to set forth the "substance of the facts and opinions." The Court of Appeals compounded this failure by simply stating that plaintiff could obtain more detailed information " – but to obtain it, she had to depose Dr. Cofelt under CR 26(b)(5)(A)(ii)."

The federal judiciary has recognized the extent of these abuses and has amended the federal counterpart to CR 26(b)(5)(A) to mandate disclosure by written report of all opinions to be expressed by an expert and the reasons therefor, all data or other information "considered by" the expert, any exhibits to be used by the experts, the qualifications of the expert, the expert's compensation, and other cases in which the expert has testified. Fed.R.Civ.P 26(a)(2).

A spirit of cooperation and forthrightness during the discovery process is essential for the efficient functioning of modern trials. Washington courts condemn intentional or technical non-disclosure. *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). It is an issue of substantial public concern that personal injury victims have access to discovery of expert opinion that is not economically burdensome and chilling. CR 26(b)(5)(A) interrogatories are intended to provide such discovery and this court should so hold.

VI. CONCLUSION

The Court of Appeals' decision frustrates the essential purpose of CR 26(b)(5)(A). The rule is intended to allow discovery of the facts known and the opinions held by experts through the use of interrogatories. Because CR 26(b)(5)(A) relies on the use of interrogatories to discover the information necessary to facilitate cross-examination and rebuttal of the expert at trial, the proper scope of the rule's requirements take on great significance.

In addition, the Court of Appeals' decision fails to acknowledge Defendant's failure to comply with mandatory PCRL 5(d)(3), which was a secondary basis provided by the trial court for its exclusion of Dr. Cofelt. Such basis for exclusion has been upheld by Division I of the Court of Appeals and is also proper here.

This Court should accept review and reverse the Court of Appeal's decision, thus, reinstating the verdict in favor of Lea Hudson.

RESPECTFULLY SUBMITTED this 11 day of June, 2005.

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